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The Dual Capacity Doctrine in Products Liability Cases in Pennsylvania

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I. INTRODUCTION

The Pennsylvania Workmen's Compensation Act[1] limits an employer's liability for injuries to employees arising out of and related to the course of employment[2] exclusively to the remedies provided under the Act.[3] The purpose of the workers' compensation scheme is to eliminate notions of fault by allowing the employee to recover under the statute, with the quid pro quo of limited liability on the part of the employer.[4]

The "dual capacity doctrine" seeks to enable an employee to recover against his or her employer beyond the scope of a workers' compensation statute by reaching the employer in an alternative capacity in which he owes a duty of care to the general public. The doctrine has been employed by several courts to find an employer, who is also a manufacturer of a defective product, liable to an employee, who is also a foreseeable consumer who is injured by the product.[5] In products liability cases, and in other types of cases adopting a similar rationale, the emphasis is not on the employer-employee relationship, but rather on some other type of relationship existing between the two, such as the manufacturer-consumer relationship, where liability may be considered as separate from the employer's limited liability under workers' compensation.[6]

A second, more narrow application of the dual capacity doctrine

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1. PA. STAT. ANN. tit. 77, §§ 1-1534 (Purdon 1952 & Supp. 1982-1983). *See infra* note 84.

2. *Id.* § 411(1). In Pennsylvania, attempts by an employee to hold an employer liable beyond workers' compensation have generally failed. Wagner v. National Indem. Co., 492 Pa. 154, 422 A.2d 1061 (1980) (employer liability to employee killed during course of employment limited to Act, where additional damages were sought under Pennsylvania's no-fault motor vehicle insurance Act).

3. PA. STAT. ANN. tit. 77, § 481(a) (Purdon Supp. 1982-1983). The remedies under the Act (*e.g.*, compensation, reimbursement of insurers) are contained in PA. STAT. ANN. tit. 77, §§ 411-467 (Purdon Supp. 1982-1983).

4. 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.11 (1982).

5. *Id.* § 72.81. *See also* Note, *Dual Capacity Doctrine: Third Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553 (1979).

6. 2A A. LARSON, *supra* note 4, § 72.81. *See also* Douglas v. E.&J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977); Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

seeks to find in the employer a separate and distinct legal identity upon which liability can be predicated for breach of a duty of care which corresponds with the alternate persona. This theory of dual capacity focuses strictly upon a definite legal identity which exists in addition to that of "employer," such as that of a trustee, landowner, or lessor, rather than upon broadly defined relationships existing between an employer and employee.[7] This rationale results in a more limited exception to workers' compensation exclusivity provisions, and is less readily applied in the products liability area.

The exclusive-remedy provisions of workers' compensation statutes which govern employer-employee relationships are in contrast to the expanded remedies available in tort actions by consumers against manufacturers.[8] Any attempted reconciliation of workers' compensation and dual capacity will pose a difficult task to courts which try to accommodate the equity of allowing recovery against a manufacturer of a defective product by a foreseeable user, even if the user is an employee, and the usually explicit exclusivity provisions of workers' compensation statutes.

This comment will explore the development of the dual capacity doctrine in the United States. It will then discuss Pennsylvania cases addressing the issue of employee recovery beyond the limits of workers' compensation, with an emphasis on such recovery in the area of products liability. The dual capacity doctrine's treatment in Pennsylvania will be explored, first by looking at cases decided in federal district courts in Pennsylvania and then by analyzing a recent Pennsylvania Supreme Court decision in relation to analogous decisions in the products liability area. Criticisms of dual capacity will be addressed, followed by a conclusion favoring acceptance of the doctrine in Pennsylvania in products liability cases.

II. Development of the Dual Capacity Doctrine

To date, three states' courts have resolved the workers' compen-

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7. Sharp v. Gallagher, 94 Ill. App. 3d 1128, 419 N.E.2d 443 (1981). *See infra* notes 48-60 and accompanying text.

8. Note, *supra* note 5, at 553, 555 (citing Larson, *Workmen's Compensation: Third Party's Action Over Against Employer*, 65 Nw. U.L. Rev. 351 (1970)). *See also* Malone, *The Limits of Coverage in Workmen's Compensation — The Dual Requirement Reappraised*, 51 N.C.L. Rev. 705 (1973); O'Connell, *Workmen's Compensation as a Sole Remedy for Employees But Not Employers*, 28 Lab. L.J. 287 (1977). *See also* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 Duq. L. Rev. 349 (1976); Comment, *Workmen's Compensation and Employer's Suability: The Dual Capacity Doctrine*, 5 St. Mary's L.J. 818 (1974).

sation/dual capacity dilemma in favor of allowing dual capacity recovery: Ohio,[9] California,[10] and Illinois.[11] All other states have either not adopted or not addressed the question.[12] Of those courts

9. Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

10. Douglas v. E.&J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

11. Sharp v. Gallagher, 94 Ill. App. 3d 1128, 419 N.E.2d 443 (1981). *See* 2A A. LARSON, *supra* note 4, §§ 72.81-.83 (Supp. 1982).

12. *Id.* The following state courts have addressed the dual capacity doctrine and rejected it: Mapson v. Montgomery White Trucks, Inc., 357 So. 2d 971 (Ala. 1978) (no dual capacity for employee injured when truck employer sold customer, and which employee was fixing, rolled onto employee; employer not in dual capacity as employer and vendor); Vineyard v. Southwest Eng'g & Contracting, 117 Ariz. 52, 570 P.2d 823 (1977) (workers' compensation benefits are exclusive recovery for employee injured in industrial accident even if collective bargaining agreement provided for safety devices to be installed by employer and they were not installed); Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 359 N.E.2d 544 (1977) (workers' compensation recovery exclusive in cases where plaintiff-employee was burned over 40% of body when employer-manufactured pressure cooker exploded; up to legislature to so alter workmens' compensation; court did not address issue if product sold to public); Atchison v. Archer-Daniels-Midland Co., 360 So. 2d 599 (La. Ct. App.), *cert. denied*, 362 So. 2d 1389 (La. 1978) (employee who lost leg by employer-manufactured machine was limited to workers' compensation; court rejects employee's products liability argument); Noland v. Westinghouse Elec. Corp., 97 Nev. 268, 628 P.2d 1123 (1981) (employee sues subcontractor-employer as manufacturer and vendor of elevator that caused injury, but court held that where Nevada statute treats subcontractors and their employees as employees of principal contractor, subcontractor has contractor's immunity to suit beyond workers' compensation statute); Cohn v. Spinks Indus. Inc., 602 S.W.2d 102 (Tex. Civ. App. 1980) (widow sues decedent's employer under dual capacity, as lessor of defective helicopter; court held remedy limited to workers' compensation even though employer buys helicopters to lease to general public; up to legislature to change workers' compensation exclusivity); Gerger v. Campbell, 98 Wis. 2d 282, 297 N.W.2d 183 (1980) (no dual capacity recovery where president of company negligently modified machine which injured employee, because he did so as employer, and not as owner or lessor of machine; court did not address issue of whether product was for sale to the public; court did not reject dual capacity totally, only on facts of case).

In Kentucky and Massachusetts, the courts refused to allow employer liability beyond workers' compensation where an employer's separate division manufactured a product that injured employee; the courts did not totally reject the possible application of dual capacity in other factual situations. Borman v. Interlake, Inc., 623 S.W.2d 912 (Ky. Ct. App. 1981) (employer-manufacturer of steel coil that caused death of employee of separate division was not liable under dual capacity; under different facts, doctrine might apply, if new duties of employer gave rise to a distinct legal persona); Longever v. Revere Copper & Brass, Inc., 80 Mass. Adv. Sh. 1767, 408 N.E.2d 857 (1980) (where employee was injured by employer-manufactured product which was sold to public, the court declined to follow Ohio and California by adopting the dual capacity doctrine, leaving it up to the legislature to alter workers' compensation exclusive recovery; court left issue open whether doctrine might be warranted under some circumstances).

In New Hampshire and North Dakota, the dual capacity doctrine was rejected, but in cases where the defective product was not sold to the general public, thereby distinguishing Douglas v. E.&J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977), which adopted the doctrine in California for products sold to the general public. *See* DePaolo v. Spaulding Fibre Co., 119 N.H. 89, 397 A.2d 1048 (1979); Latendresse v. Preskey, 290 N.W.2d 267 (N.D. 1980). Considering this "sold to the public" caveat, it is possible these

which have rejected the dual capacity doctrine, the opinion of the Court of Appeals of Michigan in *Peoples v. Chrysler Corp.*[13] is exemplary. In *Peoples,* an employee was injured while operating an employer-manufactured machine.[14] The court affirmed the lower court's summary judgment for the employer[15] despite the employee's argument that the dual capacity doctrine should apply and that the product in question had been manufactured by the employer and sold to the public.[16] The *Peoples* court distinguished a case[17] allowing a common law cause of action to an employee who sustained an injury from eating food bought in the employer's cafeteria, even though workers' compensation benefits were also allowed, because in *Peoples* the employer-employee relationship was not merely incidental to the cause of action.[18] Rather, the employee in *Peoples* was injured while using a machine in his capacity as an employee; the use of the product was a routine and integral part of the employment.[19] The court concluded that it would pose an end-run around the exclusivity provision of the workers' compensation statute that could invalidate the intent of the legislature when it created the workers' compensation system.[20]

Only recently have the courts begun to make inroads regarding the rule of strict application of workers' compensation exclusivity

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two states could adopt the doctrine should a case arise where the injury to the employee is caused by an employer-manufactured product that is for sale to the public.

In applying the appropriate state's laws, the following federal courts have rejected the dual capacity doctrine: Mott v. Mitsubishi Int'l Corp., 636 F.2d 1073 (5th Cir. 1981) (injured employee who tries to reach manufacturer-employer beyond workers' compensation under the dual capacity doctrine is limited to workers' compensation; the Texas Supreme Court had refused to consider further appeal in an analogous case, so it was unlikely Texas would accept dual capacity); Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976) (court limits injured employee's recovery to workers' compensation, where employee argued dual capacity of employer as owner of land and as manufacturer of defective product; court found the employment relationship was dominant, and it was up to Indiana state courts to make such inroads on the workers' compensation scheme, not a federal court sitting in diversity).

13. 98 Mich. App. 277, 296 N.W.2d 237 (1980).

14. *Id.* at 278, 296 N.W.2d at 238.

15. *Id.* at 283-84, 296 N.W.2d at 240-41.

16. *Id.*

17. Panagos v. North Detroit General Hosp., 35 Mich. App. 554, 192 N.W.2d 542 (1971). In *Panagos,* an employee injured her mouth on a foreign object in a piece of pie bought in the hospital cafeteria. The *Panagos* court allowed suit against the hospital under negligence and breach of warranty, because the plaintiff's cause of action was not based on the employment relationship, but on the vendor-vendee relationship. *Id.* at 558-59, 192 N.W.2d at 544.

18. 98 Mich. App. at 282-83, 296 N.W.2d at 240.

19. *Id.*

20. *Id.*

provisions. The Ohio Court of Appeals for Ottawa County recognized the dual capacity doctrine in *Mercer v. Uniroyal, Inc.*[21] In *Mercer,* the plaintiff was injured while in a truck when an employer-manufactured tire blew out, causing a collision.[22] The plaintiff argued that the court below erred in granting summary judgment to the employer, because the products liability action did not arise out of the employer-employee relationship.[23] The employee presented two arguments, both of which were accepted by the court: that the employee was not suing as an employee injured as the result of his employment, but as a reasonably foreseeable user injured by a defective product, and, that the employer acted in a second capacity which confers obligations independent of an employer's obligations.[24] The *Mercer* court stated that the hazard was not necessarily one of employment, but one common to the public in general.[25] The court reasoned that when the cause of injury is not a hazard of employment, there is no causal connection between employment and injury.[26] The court also stated that since it was only circumstance that the tire was manufactured by the employer, the employee's second assignment of error, based on the dual capacity doctrine, was well-taken.[27] An opinion partially concurring and partially dissenting agreed with the majority in its scope of employment discussion,[28] but disagreed with the majority's recognition of the dual capacity doctrine, arguing that the Ohio workers' compensation statute's exclusivity language should bar any accept-

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21. 49 Ohio App. 2d 275, 285, 361 N.E.2d 492, 496 (1977).

22. *Id.* at 280, 361 N.E.2d at 493.

23. *Id.* at 281-82, 361 N.E.2d at 494-95.

24. *Id.*

25. *Id.* at 285, 361 N.E.2d at 496. *Cf.* Knous v. Ridge Machine Co., 64 Ohio App. 2d 251, 413 N.E.2d 1218 (1980), where the dual capacity doctrine was held inapplicable where the employer/manufacturer's defective machine caused the death of an employee, because the machine was for the use of its own employees, and not for the general public. *See* 2A A. LARSON, *supra* note 4, § 72.83, at 14-245 n.23.

26. 49 Ohio App. 2d at 285, 361 N.E.2d at 496.

27. *Id.* The *Mercer* court said:

> It was only a matter of circumstance that the tire on the truck in which the plaintiff was riding was a Uniroyal tire rather than a Sears, Goodyear, or Goodrich. In recent years, corporations and employers have entered a variety of fields and economic factors have promoted diversification rather than specialization. Conglomerates have become the rule. A corporation's economic structure should not dictate the right of the injured to recover or that each new corporate merger erases a like number of causes of action.

49 Ohio App. 2d at 285-86, 361 N.E.2d at 496 (footnotes omitted).

28. *Id.* at 286, 361 N.E.2d at 497 (Wiley, J., concurring and dissenting).

ance of the doctrine by the courts.[29]

California adopted the dual capacity doctrine in the area of products liability in *Douglas v. E.&J. Gallo Winery*.[30] The issue in *Douglas* was whether employer liability existed beyond workers' compensation for injuries incurred by an employee in the course of employment, in the use of a product manufactured and sold to the public by the employer.[31] The employee was injured when employer-manufactured scaffolding collapsed.[32] The California Court of Appeal held that the employee may state a cause of action based on manufacturer's liability even though the manufacturer is also the employer and the injuries took place during the course of employment.[33] The court required the product manufactured by the employer be for sale to the public, rather than for the sole use of the employer.[34] The opinion emphasized that the focus should be on a defendant's responsibilities for his own acts where a different duty to take care arises other than duties imposed on an employer.[35] The court stated that an employer has workers' compensation immunity, but if he engages in the dual capacity of manufacture for sale to the public, the employer assumes all of the duties of a manufacturer.[36] The court justified this reasoning by

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29. *Id.* at 286, 361 N.E.2d at 498 (Wiley, J., concurring and dissenting). The Ohio workmen's compensation statute provides in pertinent part:

> Employers . . . shall not be liable to respond in damages at common law or by statute for any injury . . . received . . . by any employee in the course of or arising out of his employment, or for any death resulting from such injury . . . occurring during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay such compensation directly to his injured employees . . . .

OHIO REV. CODE ANN. § 4123.74 (Page 1978).

30. 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

31. *Id.* at 106, 137 Cal. Rptr. at 798.

32. *Id.*

33. *Id.* at 107, 137 Cal. Rptr. at 799.

34. *Id.*

35. *Id.* at 107-08, 137 Cal. Rptr. at 799.

36. *Id.* at 110, 137 Cal. Rptr. at 801. The California Workers' Compensation Act provides in pertinent part:

> Liability for compensation . . . shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of employment . . . in those cases where the following conditions of compensation concur:
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> . . . .
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> (b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment,
>
> (c) Where the injury is *proximately caused* by the employment, either with or without negligence.

stating that it was not the result of legalistic machination, but acceptance of the long recognized doctrine that every person is a bundle of rights, liabilities, and immunities.[37] Although an employee assumes the risks of employment, he does not give up his rights as a user against a manufacturer.[38]

The *Douglas* rationale regarding the dual capacity doctrine was recently upheld by the California Supreme Court in *Bell v. Industrial Vangas, Inc.*,[39] where an employee sued the manufacturer-employer and a customer because he was injured in a fire while delivering gas.[40] Mr. Bell alleged that his employer and the customer were in the business of manufacturing, purchasing, testing, and inspecting the defective products which proximately caused[41] his injuries.[42] The *Bell* court carefully reviewed the long line of California cases accepting the dual capacity doctrine, as well as the Ohio case, *Mercer v. Uniroyal, Inc.*,[43] in concluding that the doctrine was valid and applicable to Mr. Bell.[44]

Although both Ohio and California have accepted the dual capacity doctrine, their justifications for permitting employee recovery are not identical. In holding that the employee had stated a cognizable products liability cause of action against his employer in *Mercer,* the Ohio court looked to both course of employment and the dual capacity of the employer's relationship to the employee.[45] California, on the other hand, predicated the employee's cause of action in *Douglas* on policy reasons based solely on the

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CAL. LABOR CODE § 3600 (West 1978) (emphasis added).

The clause "proximately caused" of the above excerpt from the California Labor Code is not present in the analogous Ohio, Illinois, or Pennsylvania workers' compensation statute sections. *See supra* note 29; *infra* notes 54, 84.

See Morena v. Leslie's Pool Mart, 110 Cal. App. 3d 179, 167 Cal. Rptr. 747 (1980) (dual capacity applicable where plaintiff-employee injured by fumes of unlabelled chemical bottles manufactured by a different division of employer's firm). The dual capacity doctrine is not applicable where product is *not* for sale to the public. Shook v. Jacuzzi, 59 Cal. App. 3d 978, 129 Cal. Rptr. 496 (1976); Williams v. State Compensation Ins. Fund, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975).

37. 69 Cal. App. 3d at 110, 137 Cal. Rptr. at 801.

38. *Id.* at 111, 137 Cal. Rptr. at 802.

39. 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981) (en banc).

40. *Id.* at 270, 637 P.2d at 267, 179 Cal. Rptr. at 31.

41. *See supra* note 36.

42. 30 Cal. 3d at 271, 637 P.2d at 268, 179 Cal. Rptr. at 32.

43. 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976). *See supra* notes 21-29 and accompanying text.

44. 30 Cal. 3d at 278, 637 P.2d at 272-73, 179 Cal. Rptr. at 37.

45. 49 Ohio App. 2d at 281-86, 361 N.E.2d at 494-96.

employer's dual capacity obligations to the employee.[46] However, when applying the dual capacity rationale, both states' courts require that the product in question be sold to the public to whom the usual duty of care is owed.[47]

The dual capacity doctrine has also been accepted in Illinois. However, the Illinois test for dual capacity differs from that of California and Ohio. While the latter jurisdictions apply the doctrine by focusing upon the duty of care owed by the employer to the general public in order to determine dual capacity, the Illinois courts apply dual capacity only where the employer possesses a recognized separate legal identity. In *Sharp v. Gallagher*,[48] the employee was allowed to recover beyond the limits of workers' compensation when employer-manufactured scaffolding on employer-owned property caused the employee's injury.[49] In *Sharp*, the appellate court of Illinois relied on the reasoning of similar Illinois precedents, *Smith v. Metropolitan Sanitary District of Greater Chicago*,[50] and *Marcus v. Green*.[51] The *Sharp* court discussed *Smith*, which held that the duty of the owner in charge of work, under the Illinois Structural Work Act,[52] is entirely separate from the duty of the employer.[53] In *Smith*, Illinois accepted the dual capacity doctrine by imposing liability beyond the workers' compensation statute[54] on a member of a joint venture who also leased trucks to the joint venture, one of which trucks proved defective and injured an employee of the joint venture.[55] The *Smith* court found the employer in a dual capacity as a lessor, and therefore liable beyond workers' compensation.[56]

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46. 69 Cal. App. 3d at 107-08, 137 Cal. Rptr. at 799.

47. 49 Ohio App. 2d at 285, 371 N.E.2d at 496; 69 Cal. App. 3d at 107, 137 Cal. Rptr. at 799.

48. 94 Ill. App. 3d 1128, 419 N.E.2d 443 (1981).

49. *Id.* at 1136, 419 N.E.2d at 449.

50. 77 Ill. 2d 313, 396 N.E.2d 524 (1979).

51. 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973).

52. Structural Work Act § 1, ILL. ANN. STAT. ch. 48, § 60 (Smith-Hurd 1969).

53. 94 Ill. App. 3d at 1135, 419 N.E.2d at 448.

54. 77 Ill. 2d at 319, 396 N.E.2d at 527. The Illinois workmen's compensation statute provides in pertinent part:

> No common law or statutory right to recover damages from the employer . . . for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act . . . .

Workmen's Compensation Act § 5, ILL. ANN. STAT. ch. 48, § 138.5 (Smith-Hurd Supp. 1982-1983).

55. 77 Ill. 2d at 319, 396 N.E.2d at 527.

56. *Smith* set out the Illinois test for applying dual capacity:

The *Sharp* court also relied on *Marcus* in concluding that the duty of a landowner to one who comes upon his land to transact business is to exercise reasonable care for the visitor's safety while he is on the premises.[57] In *Marcus,* the employer was also found to be in a dual capacity and therefore liable to the injured employee beyond workers' compensation, in his role as the owner of land on which the employee was injured.[58]

In relying on *Smith* and *Marcus,* the *Sharp* court emphasized the dual capacity of an employer as owner of land in charge of work as the justification for application of the doctrine.[59] The *Sharp* court did not specifically address the issue of whether the scaffolding was sold by the employer to the general public, but based its acceptance on the Illinois precedents *Smith* and *Marcus.*[60] The broader policies behind the California cases accepting dual capacity were not addressed in *Sharp.* Consequently, it appears that Illinois will continue to adhere to the more narrow "separate legal identity" test in applying the dual capacity doctrine.

III. The Dual Capacity Doctrine in Pennsylvania

A. *Going Beyond Workers' Compensation Exclusivity*

The Pennsylvania Workmen's Compensation Act provides recov-

> [A]n employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer . . . . The decisive test . . . is not concerned with how separate or different the second function of the employer is . . . but with whether the second function generates obligations unrelated to those flowing from the first, that of the employer.

Id. at 318-19, 396 N.E. 2d at 527. *See* 2A A. Larson, *supra* note 4, § 72.81 at 14-229.

57. 94 Ill. App. 3d at 1135, 419 N.E.2d at 448-49.

58. 13 Ill. App. 3d at 704, 300 N.E.2d at 516. In *Marcus* the employee was a carpenter who was injured when scaffolding collapsed. He sued the owners of land on which the building was being constructed, one of which owners was the sole owner of the business engaged in the construction of the building. *Id.* at 701, 300 N.E.2d at 513-14. The court allowed the employee to sue the employer as an owner of land under the Structural Work Act, because the employer was in a different legal capacity as a land owner. *Id.* at 707, 300 N.E.2d at 518. "[I]t would produce a harsh and incongruous result to distinguish between liability to employees injured under precisely the same circumstances simply because some worked on property owned by their employers and others worked on property owned by third parties." *Id.* at 708, 300 N.E.2d at 518.

59. 94 Ill. App. 3d at 1136, 419 N.E.2d at 449. This emphasis on finding a true dual capacity role of the employer, without considering whether the product injuring the employee was for sale to the public, is a different approach from that of Ohio and California. *See supra* notes 25, 31 and accompanying text.

60. 94 Ill. App. 3d at 1135-36, 419 N.E.2d at 448-49.

ery to an employee for injuries which arise in the course of employment and which are related thereto.[61] Recovery for such injuries under the Act is exclusive.[62] In *Workmen's Compensation Appeal Board v. Ayres Philadelphia, Inc.*,[63] the claimant's husband suffered a heart attack while at work, and the court found it to be a compensable injury because there was a direct connection between the decedent's work and his heart attack.[64] The court concluded that the injury arose in the course of employment.[65]

When employees attempt to impose employer liability beyond the limits of workers' compensation, Pennsylvania courts have been reluctant to do so, even where the employer's conduct is reckless, wanton, and in disregard of the safety of others.[66] In *Ulicny v. National Dust Collector Corp.*,[67] the wife of a decedent-employee sued her husband's employer alleging other employees caused a steel cover of the dust collecting system to close in on her husband, crushing him to death.[68] The plaintiff argued that the employer's conduct went beyond ordinary negligence and was "reckless and wanton conduct in disregard of the safety of others."[69] The district court, in applying Pennsylvania law, refused to lift the employer's immunity under the workers' compensation statute.[70] Recovery was limited to workers' compensation, in a strict construction of

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61. Workmen's Compensation Appeal Bd. v. Ayres Philadelphia, Inc., 23 Pa. Commw. 249, 351 A.2d 306 (1976), *aff'd*, 479 Pa. 286, 388 A.2d 659 (1978). The 1972 amendments to the Act make it unnecessary for claimants to prove the existence of a compensable "accident." *Id.*

62. The general rule in Pennsylvania is that the remedy under workers' compensation is exclusive; an employer tortfeasor's maximum tort liability is limited to the amount available under workers' compensation. Hamler v. Waldron, 445 Pa. 262, 284 A.2d 725 (1971); Steets v. Sovereign Const. Co., 413 Pa. 458, 198 A.2d 590 (1964); Hyzy v. Pittsburgh Coal Co., 384 Pa. 316, 121 A.2d 85 (1956); Sylvester v. Peruso, 286 Pa. Super. 225, 428 A.2d 653 (1981); Mitchell v. Philadelphia Elec. Co., 281 Pa. Super. 452, 422 A.2d 556 (1980); Temple v. Able Tool Co., 240 Pa. Super. 609, 359 A.2d 412 (1976); Greer v. United States Steel Corp., 237 Pa. Super. 597, 352 A.2d 450 (1975), *rev'd on other grounds*, 475 Pa. 448, 380 A.2d 1221 (1977). *See infra* note 84.

63. 23 Pa. Commw. 249, 351 A.2d 303 (1976), *aff'd*, 479 Pa. 286, 388 A.2d 659 (1978).

64. *Id.* at 252, 351 A.2d at 307-08.

65. *Id.*

66. Ulicny v. National Dust Collector Corp., 391 F. Supp. 1265 (E.D. Pa. 1975).

67. *Id.*

68. *Id.* at 1266.

69. *Id.* at 1267.

70. *Id. But see* Readinger v. Gottschall, 201 Pa. Super. 134, 191 A.2d 694 (1963) where the intentional tort exception to workers' compensation exclusivity was allowed; the employer physically assaulted his employee and such a tort was held to not be an "accident" under the workers' compensation statute. *Id. See also infra* notes 80-83 and accompanying text.

the workers' compensation Act.[71]

In *Evans v. Allentown Portland Cement Co.*,[72] the Pennsylvania Supreme Court affirmed the lower court's dismissal of plaintiff's complaint because the employer's willful and unlawful violation of safety regulations in removing safety guards on a conveyor system, which resulted in the death of the employee, did not constitute an intentional tort actionable outside the worker's compensation Act.[73] A deliberate intent by the employer to injure the employee is necessary to state a cause of action beyond workers' compensation.[74] This deliberate intent to injure an employee was found in *Sumski v. Sauquoit Silk Co.*,[75] where the employer fraudulently had the employee use a toxic chemical agent.[76] *Sumski* was criticized, however, in *Tysenn v. Johns-Manville Corp.*,[77] where the federal district court sitting in diversity and applying Pennsylvania law, ruled the intentional tort exception to workers' compensation liability was unacceptable.[78]

Tysenn concerned the controversial asbestosis issue, making the case factually distinguishable from *Sumski*.[79] In a recent asbestosis action by employees seeking to recover from the employer-manufacturer beyond workers' compensation, *Neal v. Carey Canadian Mines, Ltd.*,[80] the employer failed to put warning labels on asbestos products regarding the hazards of exposure to asbestos.[81] The district court applied Pennsylvania law and after examining case law including *Sumski* and *Ulicny*, found there was sufficient evidence for a jury to find the employer's actions constituted a deliberate intention by the employer to harm the employees.[82] If a jury found deliberate intent to harm the employees, the employer would be liable for damages beyond workers' compensation.[83]

Ulicny, *Evans*, and *Tysenn* reveal the general reluctance of

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71. 391 F. Supp. at 1267.

72. 433 Pa. 595, 252 A.2d 646 (1969).

73. 433 Pa. at 598, 252 A.2d at 648.

74. Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 379 (E.D. Pa. 1982). *See infra* notes 80-83 and accompanying text.

75. 66 Lackawanna Jurist 118 (C.P. Lackawanna County Pa. 1965).

76. *Id.* at 123.

77. 517 F. Supp. 1290 (E.D. Pa. 1981).

78. *Id.* at 1293.

79. *See supra* notes 75-76 and accompanying text.

80. 548 F. Supp. 357 (E.D. Pa. 1982).

81. *Id.* at 366.

82. *Id.* at 381. *Evans* and *Ulicny* were also recently upheld by the Third Circuit in Weldon v. Celotex Corp., 695 F.2d 67 (3d Cir. 1982).

83. 548 F. Supp. 357, 381 (E.D. Pa. 1982).

Pennsylvania state courts and federal courts applying Pennsylvania law to go beyond the exclusivity provision of the workers' compensation Act.[84] *Neal* indicates a shift toward imposing broader employer liability beyond workers' compensation, but, as *Tysenn*, may be limited to the controversial asbestosis issue.

B. *Will Pennsylvania Adopt Dual Capacity?*

The dual capacity doctrine in employer-as-manufacturer products liability cases underwent interesting treatment in the United States District Court for the Eastern District of Pennsylvania, in *Kohr v. Raybestos-Manhattan, Inc. (Kohr I)*,[85] and *Kohr v. Raybestos-Manahattan, Inc. (Kohr II)*.[86] *Kohr I* involved a products liability action by employees or their representatives for damages caused by exposure to asbestos produced by the employer.[87] In *Kohr I*, the court stated that an employer could be held liable beyond workers' compensation as a manufacturer under the dual capacity doctrine,[88] unless the employer could show it manufactured the product solely for its own use.[89] The workers' compensation statute was held not to be a bar to tort recovery against the employer when acting in the role of manufacturer of asbestos products.[90] The court relied on the opinion of the United States Supreme Court in *Cudahy Packing Co. v. Parramore*,[91] in arguing that the purpose behind workers' compensation liability is based

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84. *See supra* notes 66-73, 77-78 and accompanying text. The Pennsylvania Workmen's Compensation Act provides in pertinent part:

> The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees . . . in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.

PA. STAT. ANN. tit. 77, § 481(a) (Purdon Supp. 1982-1983).

Sections 301(c)(1) and (2) and § 108 are in PA. STAT. ANN. tit. 77, § 27.1 (Purdon Supp. 1982-1983), which exclusively lists the occupational diseases under the Pennsylvania Workmen's Compensation Act, *e.g.*, § 27.2(k) silicosis; § 27.2(*l*) asbestosis.

85. 505 F. Supp. 159 (E.D. Pa. 1981).

86. 522 F. Supp. 1070 (E.D. Pa. 1981).

87. *Id.* at 1071.

88. 505 F. Supp. at 161.

89. *Id. See* Knous v. Ridge Machine Co., 64 Ohio App. 2d 251, 413 N.E.2d 1218 (1980). *See supra* note 25. *See also supra* note 36.

90. 505 F. Supp. at 160.

91. 263 U.S. 418 (1923) (employee killed right outside place of employ while crossing railroad track on way to work; Court held that since crossing the track was the only method to reach the plant the accident was within the course of employement and the employer was liable for workers' compensation).

on the employer-employee relationship.[92] The *Kohr I* court stated that because an employer as a manufacturer is not within this relationship, a workers' compensation statute would be no defense to common law liability.[93]

The *Kohr I* court reasoned that allowing exclusive workers' compensation liability in cases where a manufacturer's product had injured an employee would permit the tortfeasor to use workers' compensation as a shield against products liability negligence[94] and relieve a manufacturer-employer of liability because of the "chance circumstance" that the manufacturer is also the employer.[95] The *Kohr I* court also relied on Pennsylvania's acceptance of section 402 A of the Restatement (Second) of Torts,[96] which allows strict liability for injuries caused by defective products, and concluded that section 402 A should not be abrogated by the "fortuity of an employment relationship."[97] The court stated that as a federal court sitting in diversity, it had to try to predict what state law would be since Pennsylvania courts had not addressed the issue.[98] In light of the purposes of workers' compensation statutes[99] and Pennsylvania's adoption of section 402 A,[100] the court predicted

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92. 505 F. Supp. at 161. *See also* 1 A. LARSON, *supra* note 4, § 2.10.

93. 505 F. Supp. at 161. "Although an employee may be deemed to have accepted employment conditions, including workmen's compensation, to conclude that he also waived his right to bring a products liability action against a negligent manufacturer who coincidentally happens to be his employer would be unfair and unrealistic." *Id.*

94. *Id.*

95. *Id.* The court observed that exclusive workers' compensation liability here would be against the basic principle of imposing ultimate liability for negligence on the person responsible for it. *Id.*

96. RESTATEMENT (SECOND) OF TORTS § 402 A (1965) provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

97. 505 F. Supp. at 162.

98. *Id.*

99. *See supra* notes 92-93 and accompanying text.

100. Pennsylvania adopted § 402 A of the RESTATEMENT (SECOND) OF TORTS in Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

Pennsylvania courts would adopt dual capacity.[101] In so predicting, *Kohr I* relied on *Douglas v. E.&J. Gallo Winery*[102] and *Mercer v. Uniroyal, Inc.*[103] No Pennsylvania state court precedents were cited.[104]

In *Kohr II*, a four-judge panel rejected the *Kohr I* analysis[105] and held that it was the role of a federal court sitting in diversity to apply current state law, thus refusing to apply the dual capacity doctrine in Pennsylvania.[106] The court observed that the Pennsylvania Workmen's Compensation Act provided the exclusive liability of employers[107] and stated that the court should follow the "plain meaning" of the statute.[108] In an area of the law where state courts have not spoken, the *Kohr II* court maintained that federal courts in diversity can only predict, not form, state law, and cannot ignore a statute's "plain meaning" "merely in order to effectuate a judicially created legal theory which seeks to expand a manufacturer's liability."[109] The court conceded the basic appeal and equity behind the dual capacity doctrine,[110] but ruled that any change in the exclusivity provision of the Pennsylvania Workmen's Compensation Act must come from the state legislature or the Pennsylvania Supreme Court.[111]

A recent Pennsylvania Supreme Court case, *Tatrai v. Presbyterian University Hospital*,[112] may be some indication of the likelihood of acceptance of the dual capacity doctrine in Pennsylvania. *Tatrai* is not a products liability case, but is one that allowed an employee to establish the liability of an employer-hospital, as a

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101. 505 F. Supp. at 162. The court also relied on what it believed was the majority rule among the other states; this mistaken view was corrected in *Kohr II*, 522 F. Supp. 1070, 1077, n.1 (E.D. Pa. 1981).

102. 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

103. 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

104. 505 F. Supp. at 161.

105. 522 F. Supp. at 1075-76.

106. *Id.* at 1075. "Federal courts sitting in diversity cases must ascertain and apply state law." *Id.* at 1074 (citing Erie R.R. v. Tompkins, 304 U.S. 64 (1938)).

107. 522 F. Supp. at 1075. *See supra* note 84.

108. 522 F. Supp. at 1074.

109. *Id.* at 1075-76.

110. *Id.* at 1076.

111. *Id.* Judge Troutman, who decided *Kohr I*, filed a concurring opinion in *Kohr II*, reversing *Kohr I*. *Id.* at 1076-77. Thus, the Eastern District of Pennsylvania was fully behind the *Kohr II* decision.

112. 497 Pa. 247, 439 A.2d 1162 (Pa. 1982). Justice Nix wrote the opinion reversing the Pennsylvania Superior Court; Justice Roberts wrote an opinion in which Chief Justice O'Brien and Justices Larsen and Flaherty joined. Justices Wilkinson and Kauffman did not participate in the case. *Id.* at 255, 439 A.2d at 1166.

provider of medical services, beyond workers' compensation.[113]

In *Tatrai*, the Pennsylvania Supreme Court reversed an order limiting the plaintiff-nurse's recovery of workers' compensation.[114] Ms. Tatrai became ill while at work at the defendant-hospital and was told by her supervisor to go to the hospital emergency room for x-rays.[115] She was injured when the x-ray stand collapsed, causing her to fall and injure her foot.[116] The majority held that since the employee was injured in the emergency room, which the hospital held out to the public as providing medical services, the workers' compensation Act was not a bar to the employee's common law action.[117]

Justice Roberts stated for the majority that, contrary to the view of Justice Nix,[118] whether the injury arose in the course of employment was not the issue in this case.[119] The only relevant fact, as he saw it, was that Ms. Tatrai was injured in the emergency room which was open to the general public.[120] Ms. Tatrai was exposed to the same risks as any other paying member of the public, and the majority concluded that she was entitled to the same degree of care in treatment.[121] The fact that Ms. Tatrai had received treatment at a hospital at which she was employed at the time of the injury was no reason to distinguish her from any other patient.[122] Justice Roberts quoted the California and Ohio cases, *D'Angona v. County of Los Angeles*[123] and *Guy v. Arthur H. Thomas Co.*[124] in stating that where an injury that arises from a relationship independent of that of employer-employee, and involves a different set of obligations from employers' obligations, there is no reason to shield the employer from common law liability.[125] He stated that only "blind adherence" to the workers' compensation Act language — an act designed to help, not hinder employees in pursuit of benefits — could deprive Ms. Tatrai of the opportunity to proceed on

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113. *Id.* For a general discussion of *Tatrai*, see 21 DUQ. L. REV. 563 (1983).
114. 497 Pa. at 255, 439 A.2d at 1166 (Nix, J.).
115. *Id.* at 249, 439 A.2d at 1163 (Nix. J.).
116. *Id.*
117. *Id.* at 255, 439 A.2d at 1166-67 (Roberts, J.).
118. *See infra* notes 127-36 and accompanying text.
119. 497 Pa. at 255, 439 A.2d at 1166 (Roberts, J.).
120. *Id.*
121. *Id.*
122. *Id.* at 255-56, 439 A.2d at 1166 (Roberts, J.).
123. 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980).
124. 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978).
125. 497 Pa. at 256, 439 A.2d at 1166-67 (Roberts. J.).

her cause of action.[126]

Justice Nix, in his separate opinion, also allowed the employee her common law action, but limited his rationale to a finding that the injury occurred beyond the scope of her employment.[127] He described two types of injury which arise in the course of employment: those occurring while the employee is furthering the employer's business, and those occurring on the employer's premises.[128] Justice Nix rejected the hospital's contention that the employee was injured in furtherance of the employer's business because it is too tenuous a benefit to the employer to ensure the health of hospital employees.[129] The primary purpose of treatment here was for the employee's own benefit.[130] Justice Nix found that the treatment given Ms. Tatrai was totally extraneous to the employment scheme.[131] He stated that her illness interrupted her employment activities and rendered her incapable of continuing them.[132] Even though the employee was paid for the time she was being treated, Justice Nix reasoned that this was inconclusive as to the issue of furthering the hospital's business, because she probably would have been paid if she had gone elsewhere for treatment.[133] He also noted that the hospital billed Blue Cross for her treatment, as it would have for any member of the general public.[134]

Regarding the second type of injury, that occurring on the employer's premises, Justice Nix found that the employee's presence on the employer's premises at the time of injury was only fortuitous.[135] Her presence in the emergency room was not to further her employer's business, and was not required by her employment, and Justice Nix concluded, she was not limited to workers' compensation.[136]

The Pennsylvania Supreme Court's decision in *Tatrai* evidences a disagreement on the court over the relevant issue behind al-

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126. *Id.* at 257, 439 A.2d at 1167 (Roberts, J.) (quoting Reed v. The Yaka, 373 U.S. 410, 415 (1963).

127. 497 Pa. at 255, 439 A.2d at 1166 (Nix, J.).

128. *Id.* at 251, 439 A.2d at 1164 (Nix, J.).

129. *Id.* at 252, 439 A.2d at 1164 (Nix, J.).

130. *Id.*

131. *Id.* at 252, 439 A.2d at 1165 (Nix, J.).

132. *Id.* at 253, 439 A.2d at 1165 (Nix, J.).

133. *Id.*

134. *Id.*

135. *Id.* at 253-54, 439 A.2d at 1165-66 (Nix, J.).

136. *Id.* at 255, 439 A.2d at 1166 (Nix, J.).

lowing the employee her common law action. Justice Nix allowed her suit based on his interpretation of "course of employment," while Justice Roberts for the majority recognized a second capacity in the employer which subjected it to suit.[137] These two views of employer liability were discussed by the Ohio Court of Appeals for Ottawa County in *Mercer v. Uniroyal, Inc.*[138] The *Mercer* court held that the employee should have an opportunity to establish a cause of action based on products liability because the activity was beyond the scope of employment, and that the employer-manufacturer acted in a second capacity that conferred obligations independent of an employer.[139] The concurrence/dissent in *Mercer* agreed with the majority's view on scope of employment, but would not have recognized the dual capacity of the employer.[140] In *Tatrai,* the majority recognized only the dual capacity, while Justice Nix would have limited the holding to scope of employment.[141]

The Ohio Supreme Court also recognized the dual capacity doctrine in a hospital services case similar to *Tatrai, Guy v. Arthur H. Thomas Co.*[142] The *Guy* court recognized the dual capacity of the hospital-employer which conferred obligations independent from its obligations as employer.[143] The *Guy* court relied on the California case *Duprey v. Shane,*[144] where the California Court of Appeal recognized the doctrine where a doctor-employer bore two independent relationships and obligations toward the employee-patient.[145]

A parallel situation to the Ohio cases of *Mercer* and *Guy* arose in California in *Douglas v. E.&J. Gallo Winery*[146] and *D'Angona v. County of Los Angeles.*[147] In *D'Angona,* the California Supreme Court allowed a hospital employee to reach the employer beyond workers' compensation because of aggravation of injuries in the

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137. *See supra* notes 118-36 and accompanying text.

138. *See supra* notes 21-29 and accompanying text.

139. 49 Ohio App. 2d at 282-86, 361 N.E.2d at 494-96. *See supra* note 27 and accompanying text.

140. 49 Ohio App. 2d at 289-90, 361 N.E.2d at 498-99. *See supra* notes 28-29 and accompanying text.

141. *See supra* notes 125, 136 and accompanying text.

142. 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978).

143. *Id.* 378 N.E.2d at 488.

144. 39 Cal. 2d 781, 249 P.2d 8 (1952).

145. *Id.* at 793, 249 P.2d at 15-16.

146. 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977). *See supra* notes 30-38 and accompanying text.

147. 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980).

hospital emergency room.[148] In reasoning similar to that of *Tatrai,* the *D'Angona* court emphasized that the hospital was open to the public, and in causing the employee's injury it was not acting in its capacity as employer, but as a hospital with corresponding obligations to a patient.[149] As in Ohio, California has accepted the dual capacity doctrine in both products liability cases *(Douglas)* and hospital services cases *(D'Angona).*

The reasoning of the majority of the Pennsylvania Supreme Court in *Tatrai,* in allowing a common law suit against the hospital, is very similar to the language used by the California and Ohio courts in accepting the dual capacity doctrine in products liability cases. For example, the *Tatrai* court stated, regarding Ms. Tatrai's injury in the emergency room: "In holding itself out to the public as a provider of medical services . . . [the] hospital owed a duty to all its patients. There is no basis for distinguishing [Ms. Tatrai], a paying customer, from any other member of the public injured during the course of treatment."[150] The court in the Ohio case, *Mercer,* said it was "only a matter of circumstance"[151] that the tire that injured the employee was manufactured by his employer.[152] In the California case, *Douglas,* the fact that the employer-manufactured product was sold to the public exposed the employer to dual capacity treatment.[153]

In his dissent in the Pennsylvania Superior Court decision in *Tatrai,*[154] Judge Hoffman cited *D'Angona v. County of Los Angeles,* in arguing that the workers' compensation Act should not be Ms. Tatrai's exclusive remedy, because the hospital held itself out to the public as a provider of medical services, and occupied a different role with subsequent new duties.[155] Judge Hoffman's dissent pointed out that the employee's presence in the hospital emergency room was not in furtherance of the employer's business, was not required by the terms of employment, and that the employee was charged for services.[156] These points formed a large part of the rationale of the Pennsylvania Supreme Court in its reversal of the

148. *Id.* at 669, 613 P.2d at 244, 166 Cal. Rptr. at 183.
149. *Id.*
150. 497 Pa. at 255, 439 A.2d at 1166 (Roberts, J.).
151. 49 Ohio App. 2d at 285, 361 N.E.2d at 496. *See supra* note 27.
152. *Id.*
153. 69 Cal. App. 3d at 107, 137 Cal. Rptr. at 799.
154. 284 Pa. Super. 300, 306, 425 A.2d 823, 826 (1981) (Hoffman, J., dissenting).
155. *Id.* at 308-09, 425 A.2d at 827 (Hoffman, J., dissenting).
156. *Id.* at 313, 425 A.2d at 829 (Hoffman, J., dissenting).

superior court.[157]

Tatrai is an indication that Pennsylvania may accept the dual capacity doctrine in products liability cases, where it is clear that a "product," even in the form of health services, is sold to the public. This would put Pennsylvania in accord with Ohio and California in recognizing the dual capacity of employers as manufacturers, regarding products which injure employees and are also for sale to the public.[158] There appears to be no reason for treating a product for sale to the public differently from medical services held out to the public.

There are, however, commentators who strongly urge restraint in imposing liability on employers beyond workers' compensation. In his treatise,[159] Professor Larson disputes the usefulness of the term "dual capacity"[160] and prefers the term "dual persona."[161] Larson explains this by stating that a typical third party statute usually defines a third party as "a *person* other than the employer," not as "a person acting in a capacity other than that of employer."[162] He argues that only in exceptional circumstances should even this "dual persona" concept be utilized.[163] Professor Larson questions the propriety of imposing the dual capacity doctrine in any but the most limited areas, and would apply it only in cases in which the employer has a distinct and separate second legal identity,[164] whether the case is products liability or otherwise.[165] For example, Larson lists as an instance of an already recognized legal duality in persona, a trustee who is also the owner of his own business.[166] Larson argues that the issue is not one of activity or relationship,

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157. *See supra* text accompanying notes 119-26.
158. *See supra* text accompanying notes 25-27, 33.
159. *See* 2A A. LARSON, *supra* note 4.
160. *Id.* § 72.81, at 14-230.
161. *Id.*
162. *Id.* § 72.81, at 14-230 to -231.
163. *Id.* § 72.81, at 14-234.
164. *Id.* § 72.81, at 14-229.
165. *Id.* § 72.83 at 14-245. Professor Larson states:

> [E]ven under the most permissive definition of dual capacity, the Ohio and California cases cannot be justified . . . . The employer has a duty as employer to provide safe scaffolding; he has a duty as manufacturer to make safe scaffolding; if he makes unsafe scaffolding and provides it to his employee to be used in his work, the two obligations are braided together so tightly they cannot possibly be separated . . . . [S]ince the machine was used to aid the employer's business, construction of the machine was auxiliary to business.

Id. (footnotes omitted) (referring to Goetz v. Avildsen Tool and Mach., Inc., 82 Ill. App. 3d 1054, 403 N.E.2d 555 (1980)).
166. 2A A. LARSON, *supra* note 4, § 72.81, at 14-232.

but of identity.[167] The employer is always an employer,[168] and the only way to break through this fact is by use of legal fiction.[169] Larson asserts that other dualities should only be created statutorily.[170]

In *Tatrai,* the Pennsylvania Supreme Court allowed dual recovery against the hospital-employer.[171] Professor Larson accepts application of the dual capacity doctrine *only* in those limited cases in which the employer is in the business of furnishing medical services, and the responsibility for malpractice is *personal,* not vicarious.[172] Such a case of personal liability is the California case of *Duprey v. Shane,*[173] where the employer-chiropractor negligently treated his employee; the California Court of Appeal held that the dual capacity doctrine applied.[174] The doctrine, according to Larson, should not be extended to hospital emergency room cases, such as *D'Angona v. County of Los Angeles.*[175] Professor Larson criticizes *D'Angona* arguing that there is a great difference between *Duprey,* where the injury was *personally* caused by the doctor-employer, and *D'Angona,* where the California Supreme Court held the hospital had obligations to the employee-patient independent from its obligations as employer.[176] Professor Larson also disputes the validity of the rationale used by the Illinois courts in accepting the dual capacity doctrine in cases where the employer is the owner of land on which the injury occurred.[177] Larson contends mere ownership of land does not endow a person with a second legal persona.[178] Furthermore, he argues that for practical reasons, an employer, as part of his business will usually own or occupy the premises, and if every function connected with maintaining the premises could ground a tort suit, exclusivity provisions in work-

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167. *Id.* § 72.81, at 14-231.

168. *Id.* (quoting with approval Tennessee Supreme Court in McAlister v. Methodist Hosp., 550 S.W.2d 240, 246 (Tenn. 1977); "The employer is the employer; not some other person other than the employer. It is that simple.").

169. 2A A. LARSON, *supra* note 4, § 72.81, at 14-231.

170. *Id.* § 72.81, at 14-232.

171. *See supra* note 125 and accompanying text.

172. 2A A. LARSON, *supra* note 4, § 72.61(c), at 14-209.

173. 39 Cal. 2d 781, 249 P.2d 8 (1952).

174. *Id.* at 793, 249 P.2d at 15-16.

175. 27 Cal. 3d 661, 613 P.2d 238, 166 Cal. Rptr. 177 (1980). *See* 2A A. LARSON, *supra* note 4, § 72.61(c), at 14-209 to -210.

176. 2A A. LARSON, *supra* note 4, § 72.61(c), at 14-209 to -210.

177. *Id.* § 72.82, at 14-238.

178. *Id.*

ers' compensation statutes "would be reduced to a shambles."[179]

IV. Conclusion

In spite of the criticisms of Professor Larson of the dual capacity doctrine, it appears likely to be accepted in Pennsylvania in products liability cases. The Ohio and California hospital services decisions accepting the doctrine, *Guy* and *D'Angona*, are similar to *Tatrai* in rationale and result.[180] The majority in *Tatrai* quoted both cases in recognizing the dual capacity of the hospital-employer.[181] The policies and rationale of *Guy* and *D'Angona* which were quoted with approval by the *Tatrai* majority are the same policies expressed in the products liability cases accepting dual capacity, *Mercer* in Ohio and *Douglas* in California.[182] A recognition that the employer assumed a second, independent capacity with obligations separate from its obligations as employer was a common thread in *Mercer, Guy, D'Angona, Douglas,* and *Tatrai.*[183] This recognition of a second capacity of the employer, combined with a holding out by the employer to the general public, established the dual capacity doctrine in *D'Angona, Douglas,* and *Tatrai.*[184] There is a crossover in policy justifications for acceptance of the doctrine in products liability cases and hospital services cases in Ohio and California, and it is likely, after *Tatrai,* that Pennsylvania will follow suit in products liability cases. The reasoning behind acceptance is sound: It is not unfair to strip the employer of workers' compensation immunity if he acts in a capacity other than that of an employer. If the doctrine is not applied to such cases, the fortuitous circumstance of being a manufacturer's employee will inequitably restrict an injured user of a defective product from pursuing a cause of action in the expanding area of products liability.

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179. *Id.* Larson also rejects application of the dual capacity doctrine in the area of owner or charterer of a vessel. *Id.* § 72.84.

180. *See supra* text accompanying notes 142-49.

181. *See supra* text accompanying notes 123-25.

182. *See supra* text accompanying notes 21-38.

183. *See supra* text accompanying notes 21-38, 123-25, 142-49.

184. *See supra* text accompanying notes 34-35, 149-50.